

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDREW DEWAYNE CARTER,

Defendant.

Case No. 2:15-cr-322-KJD-VCF

**ORDER**

Presently before the Court are the Report and Recommendation (#34) of Magistrate Judge Cam Ferenbach entered March 4, 2016 recommending that Defendant's Motion to Suppress (#28) be granted. Objections to Magistrate Judge's Report and Recommendation (#36) were filed by the Government pursuant to Local Rule IB 3-2 of the Local Rules of Practice of the United States District Court of the District of Nevada. Defendant filed his response (#40) to the Government's objections on April 7, 2016 and the Government filed a reply (#42) on April 13, 2016.

The Court has conducted a *de novo* review of the record in this case in accordance with 28 U.S.C. § 636(b)(1) and LR IB 3-2. The Court determines that the Report and Recommendation (#34) of the United States Magistrate Judge entered March 4, 2016, should be reversed in part.

1 **I. Background**

2 On November 17, 2015, a federal grand jury issued an indictment charging defendant with  
3 conspiracy to commit sex trafficking in violation of 18 U.S.C. § 1591(a)(1), (b)(1), and (c); sex  
4 trafficking, in violation of 18 U.S.C. § 1591(a)(1), (b)(1), and (c); conspiracy to transport for  
5 prostitution, in violation of 18 U.S.C. § 2423(a); transportation for prostitution, in violation of 18  
6 U.S.C. § 2423(a); and travel with intent to engage in illicit conduct, in violation of 18 U.S.C. §  
7 2423(b).

8 On September 18, 2015, Defendant Carter was interviewed by Metro Detective VanCleaf  
9 about Defendant's possible involvement in sex trafficking. The interview was recorded and  
10 transcribed, in which Detective VanCleaf identified himself and asked Defendant his name and date  
11 of birth. Detective VanCleaf then gave Defendant the following Miranda warnings:

12 "Okay Andrew, um, you have the right to remain silent. Anything you say can  
13 be used against you in a court of law. You have the right to the presence of an  
14 attorney. If you can't afford an attorney one will be appointed before  
15 questioning. Do you understand your right?"

16 (# 34 at 2).

17 After Defendant acknowledged that he understood his rights, Detective VanCleaf began  
18 questioning Defendant about his background and criminal history. The Detective then moved on to  
19 Defendant's possible involvement in prostitution and sex trafficking. When Detective VanCleaf  
20 questioned the Defendant about his alleged involvement with the victim, Defendant Carter stated the  
21 following:

22 Carter: "Do I need a lawyer for this? Am I going to need a lawyer?"

23 Detective VanCleaf: "I can't - I can't - I can't advise you yes or no. If you want one..."

24 Carter: "I mean I don't, um, you feel me? I don't like where this is going already."

25 Detective VanCleaf: "Fine."  
26

1 This was labeled by the Magistrate Judge as Defendant's First Request for Counsel. The  
 2 Detective then asked a couple of questions regarding the victim and a motel near Defendant's  
 3 apartment. At this point, Defendant Carter stated the following:

4 Carter: "But I think I'm - I think I'm going to get a lawyer on this one."

5 Detective VanCleaf: "Okay"

6 This was labeled by the Magistrate Judge as Defendant's Second Request for Counsel.  
 7 Following Defendant's Second Request for Counsel, Detective VanCleaf ceased all questions and  
 8 limited his responses to phrases such as; "Okay," "Fine," and "I can't really talk 'cause you asked for  
 9 a lawyer[.]" See # 36 Ex. 1 at 16-17. Detective VanCleaf then informed Defendant that he would be  
 10 rebooked on charges related to sex trafficking.

11 Defendant moved to suppress the incriminating statements he made in his interview with  
 12 Detective VanCleaf on two grounds: 1) Defendant was not given adequate Miranda warnings; and 2)  
 13 Detective VanCleaf did not stop the interview when Defendant first invoked his right to counsel. See  
 14 # 28.

## 15 **II. Miranda Analysis**

16 The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to  
 17 be a witness against himself." U.S. Const. Amendment V. The Supreme Court held that the Fifth  
 18 Amendment affords a citizen the right to be informed prior to custodial interrogation that "he has the  
 19 right to remain silent, that anything he says can be used against him in a court of law, that he has the  
 20 right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for  
 21 him prior to any questioning." Miranda v. Arizona, 384 U.S.436, 479 (1966). The Supreme Court  
 22 does not require a "talismanic incantation ... to satisfy [Miranda's] strictures." California v. Prysock,  
 23 453 U.S. 355, 359 (1981). Further, courts reviewing the adequacy of warnings "need not examine  
 24 Miranda warnings as if construing a will or defining the terms of an easement." Duckworth v. Eagan,  
 25 492 U.S. 195, 203 (1989). However, the warnings given must "adequately convey notice of the right  
 26

1 to consult with an attorney before questioning.” People of the Territory of Guam v. Snaer, 758 F.2d  
2 1341, 1342 (9th Cir. 1985).

3 In his report and recommendation, Magistrate Judge Ferenbach relying, in part, on recent in  
4 District holdings, found that the Miranda warnings given to Defendant were not explicit enough to  
5 inform Defendant that he had the right to consult with an attorney *before* questioning. Id. at 1342;  
6 United States v. Chavez, 111 F. Supp. 3d 1131, 1146 (D. Nev. 2015); United States v. Larry  
7 Loucious, Case No. 2:15-cr-106-JAD-CWH, Doc. No. 75 (D. Nev. Feb. 19, 2016).

8 However, the Court agrees with the reasoning in United States v. Davis, No. 2:12-cr-289-  
9 JCM-PAL, 2016 WL 3092110, at \*3 (D. Nev. June 1, 2016), and has looked to the warning as a  
10 whole to determine if the Defendant was adequately informed of his rights under Miranda. The Court  
11 finds that although Detective VanCleaf didn’t explicitly state that Defendant had a right to consult  
12 with an attorney *before* questioning, a reasonable suspect would have understood that right after  
13 hearing all the Miranda warnings. Namely the warnings that Defendant had “the right to the presence  
14 of an attorney,” and that if he “can’t afford an attorney one will be appointed *before* questioning.”  
15 (#34 at 2) (emphasis added). In sum, the Court determines the Detective properly informed the  
16 Defendant of his rights under Miranda.

17 Therefore, the Court reverses the Magistrate Judge’s determination that the Miranda warning  
18 was inadequate and the conclusion that Defendant’s statements should be suppressed.

### 19 **III. Request for Counsel Analysis**

#### 20 A. First Request for Counsel

21 Law enforcement officers must immediately cease questioning a suspect who has clearly  
22 asserted his right to have counsel present during custodial interrogation. Edwards v. Arizona, 451  
23 U.S. 477, 482 (1981). However, “if a suspect makes a reference to an attorney that is ambiguous or  
24 equivocal in that a reasonable officer in light of the circumstances would have understood only that  
25 the suspect might be invoking the right to counsel, our precedents do not require the cessation of  
26 questioning.” Davis v. U.S., 512 U.S. 452, 459 (1994). Many courts have determined whether

1 statements made by defendants during questioning were unambiguous requests for counsel. See Id. at  
2 462 (“Maybe I should talk to a lawyer” held to be ambiguous); U.S. v. de la Jara, 973 F.2d 746, 750  
3 (“Should I get an attorney?” determined to be an ambiguous reference to counsel); Norman v.  
4 Ducharme, 871 F.2d 1483, 1486 (defendant asking whether “he should get an attorney” is  
5 ambiguous); Shedelbower v. Estelle, 885 F.2d 570, 571 (“You know, I’m scared now. I think I should  
6 call an attorney.” found to be an unequivocal request for counsel).

7       The Magistrate Judge, comparing this case to Shedelbower, held that Defendant’s questions;  
8 “Do I need a lawyer for this? Am I gonna need a lawyer?,” combined with his subsequent statement;  
9 “I don’t like where this is going already,” constituted an unambiguous request for counsel. However,  
10 this Court finds that Defendants statements are distinguishable from Shedelbower, because he was  
11 asking the Detective if he should obtain counsel rather than stating his intent to obtain counsel. See  
12 Id. at 571. The Court determines that Defendant’s references to counsel are more comparable to de la  
13 Jara and Norman because they are questions, rather than statements of intent. De la Jara, 973 F.2d at  
14 750; Norman, 871 F.2d at 1486. Thus, the Court finds that Defendant’s “First Request for Counsel”  
15 was not an unequivocal request for counsel.

16       Accordingly, the Court reverses the Magistrate Judge’s determination that Defendant’s  
17 statements should be suppressed because the request for counsel was equivocal.

#### 18       B. Second Request for Counsel

19       However, the Court agrees with the Magistrate Judge’s finding that had Defendant’s second  
20 request for counsel been his only request for counsel, his subsequent statements would be admissible.  
21 Therefore, because the Court finds that the First Request for Counsel was ambiguous, Defendant’s  
22 statements are admissible despite the fact that his Second Request for Counsel was unambiguous and  
23 unequivocal, because the statements made after the Second Request for Counsel were not the product  
24 of interrogation.

1 **IV. Conclusion**

2 IT IS THEREFORE ORDERED that the Magistrate Judge's Report and Recommendation  
3 (#34) entered March 4, 2016, is **REVERSED in part**, and Defendant's Motion to Suppress (#28) is  
4 **DENIED.**

5 DATED this 30<sup>th</sup> day of June 2016.

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9 Kent J. Dawson  
10 United States District Judge  
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